

Commission's authority over "charges, classifications, practices, services, facilities, or regulation for or in connection with intrastate communications service."<sup>98</sup> Even though, for the reasons stated above, we find section 2(b) not to be relevant to sections 271 and 272, we find that the manufacturing activities addressed by sections 271 and 272 are not, in any event, within the scope of section 2(b). Alternatively, even if section 2(b) were deemed to apply with respect to BOC manufacturing, we find that such manufacturing activities plainly cannot be segregated into interstate and intrastate portions. Thus, any state regulation inconsistent with sections 271 and 272 or our implementing regulations would necessarily thwart and impede federal policies, and should be preempted.<sup>99</sup>

### III. ACTIVITIES SUBJECT TO SECTION 272 REQUIREMENTS

50. Section 272(a) provides that a BOC (including any affiliate) that is a LEC subject to the requirements of section 251(c) may provide certain services only through a separate affiliate.<sup>100</sup> Under section 272, BOCs (or BOC affiliates) may engage in the following activities only through one or more affiliates that are separate from the incumbent LEC entity: (A) manufacturing activities; (B) interLATA telecommunications services that originate in-region;<sup>101</sup> and (C) interLATA information services.<sup>102</sup> We discuss below both the activities subject to the section 272 separate affiliate requirements and the activities that are exempt from these requirements.

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<sup>98</sup> 47 U.S.C. § 152(b).

<sup>99</sup> See Louisiana Public Service Comm'n, at 377.

<sup>100</sup> 47 U.S.C. § 272(a)(1).

<sup>101</sup> Section 272(a)(2)(B) exempts from the separate affiliate requirement for origination of interLATA telecommunications services certain incidental interLATA services (as described in sections 271(g)(1), (2), (3), (5), and (6)), out-of-region services (as described in section 271(b)(2)), and previously authorized activities (as described in section 271(f)).

<sup>102</sup> Although they are information services (see 47 U.S.C. §§ 153(20), 272(a)(2)(C)), electronic publishing (as defined in section 274(h)) and alarm monitoring services (as defined in section 275(e)) are exempted from the section 272 separate affiliate requirements, and are subject to their own specific statutory separate affiliate and/or nondiscrimination requirements.

**A. General Issues****1. Definition of "interLATA services"****a. Background**

51. In the Notice, we indicated that the 1996 Act defines "interLATA service" as a telecommunications service.<sup>103</sup> We further stated that, where the 1996 Act draws distinctions between in-region and out-of-region "interLATA services," these distinctions do not apply to interLATA information services.<sup>104</sup>

**b. Comments**

52. Although we did not specifically seek comment on this analysis, several parties disagree with our interpretation of the scope of the term "interLATA services." BellSouth and MFS argue that the definition of "interLATA services" includes interLATA information services.<sup>105</sup> They further dispute our view that "interLATA service" only refers to "telecommunications services," arguing that the statutory definition in section 3(21) refers to "telecommunications" provided across LATA boundaries, not to "telecommunications services" provided across LATA boundaries.<sup>106</sup> MFS states that "telecommunications" is defined in section 3(43) as the transmission of information without change in the form or content of the information, whereas "information services" are defined in section 3(20) as the "offering of a capability for generating, . . . or making available information via telecommunications."<sup>107</sup> Therefore, argues MFS, "interLATA information services" must logically incorporate the transmission of, or capability for transmitting, information between LATAs, which is an interLATA service.<sup>108</sup>

53. In addition, BellSouth states that section 271(b) describes how section 271 applies to several categories of "interLATA services," including "incidental interLATA services." Since certain of the "incidental interLATA services" set forth in section 271(g) are indisputably information services, BellSouth argues that "interLATA services" must encompass interLATA

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<sup>103</sup> Notice at ¶ 41 n.80.

<sup>104</sup> Id.

<sup>105</sup> BellSouth at 19 n.45; accord ITAA at 7; MFS at 10; Ameritech Reply at 33; MFS Reply at 6-7; see also MCI Reply at 8.

<sup>106</sup> BellSouth at 22-23 & n.55; MFS Reply at 6.

<sup>107</sup> MFS Reply at 6.

<sup>108</sup> Id.; accord BellSouth at 23.

information services.<sup>109</sup> MFS also argues that, because Congress distinguished between interLATA telecommunications services and interLATA information services in section 272(a)(2), its use of the term "interLATA services" in section 271 clearly indicates an intent to include both information and telecommunications services.<sup>110</sup> MFS specifically argues that the section 271 restrictions apply to "interLATA services" and are not limited to "interLATA telecommunications services."<sup>111</sup>

54. MCI notes that BellSouth's interpretation of "interLATA services" as encompassing both interLATA telecommunications and information services in section 271(b) would mean that a BOC could not provide in-region interLATA information services until it had obtained section 271 authorization.<sup>112</sup> In response, BellSouth acknowledges that, prior to providing interLATA information services that are neither previously authorized activities under section 271(f) nor incidental interLATA services under section 271(g), the BOCs are required to obtain section 271 authorization from the Commission.<sup>113</sup>

#### c. Discussion

55. Upon consideration of the arguments raised in the record, we modify our interpretation of the scope of the term "interLATA service." Consistent with the views of the commenters that addressed this point, we conclude that the term "interLATA services" encompasses both interLATA information services and interLATA telecommunications services.<sup>114</sup>

56. We are persuaded that the definition of "interLATA service," which is "telecommunications between a point located in a [LATA] and a point located outside such area,"<sup>115</sup> does not limit the scope of the term to telecommunications services because, as MFS and BellSouth point out, information services are also provided via telecommunications. Elsewhere in this Report and Order, we conclude that "interLATA information services" must include a

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<sup>109</sup> BellSouth at 21-22; see also Letter from Robert T. Blau, Vice President - Executive and Federal Regulatory Affairs, BellSouth, to Carol Matthey, Deputy Division Chief, Policy and Program Planning Division, Common Carrier Bureau, at 1-2 (filed Oct. 29, 1996) (BellSouth Oct. 29 Ex Parte).

<sup>110</sup> MFS at 10.

<sup>111</sup> Id.

<sup>112</sup> MCI Reply at 8.

<sup>113</sup> See BellSouth Oct. 29 Ex Parte at 1-2.

<sup>114</sup> E.g., BellSouth at 19 n.45; accord ITAA at 7; MFS at 10; Ameritech Reply at 33; MFS Reply at 6-7; see also MCI Reply at 8.

<sup>115</sup> 47 U.S.C. § 153(21).

bundled, interLATA transmission component.<sup>116</sup> Thus, interLATA information services are provided via interLATA telecommunications transmissions and, accordingly, fall within the definition of "interLATA service." Moreover, we believe that it is a more natural, common-sense reading of "interLATA services" to interpret it to include both telecommunications services and information services. In addition, as MFS argues, in section 272(a)(2), Congress uses and distinguishes between "interLATA telecommunications services" and "interLATA information services," demonstrating that it limited the term "interLATA services" to transmission services when it wished to. Further, if Congress had intended the term "interLATA services" to include only interLATA telecommunications services, its use of the term "interLATA telecommunications services" in section 272(a)(2) would have been unnecessary and redundant.

57. As MCI points out, interpreting the term "interLATA services" to include both interLATA telecommunications and interLATA information services means that a BOC may not provide in-region interLATA information services until it obtains section 271 authorization.<sup>117</sup> As a practical matter, we believe that interpreting "interLATA services" to include interLATA information services will not alter the application of section 271. As noted above, and discussed in greater detail below, we conclude that the term "interLATA information service" refers to an information service that incorporates as a necessary, bundled element an interLATA telecommunications transmission component provided to the customer for a single charge.<sup>118</sup> Thus, regardless of whether we interpret "interLATA service" to include interLATA information services, a BOC would be required to obtain section 271 authorization prior to providing, in-region, the interLATA telecommunications transmission component of an interLATA information service.

## 2. Application of Section 272 Safeguards to International InterLATA Services

58. In the Notice, we tentatively concluded that Congress intended the section 272 safeguards to apply to all domestic and international interLATA services.<sup>119</sup> All of the parties that commented on this point supported this tentative conclusion.<sup>120</sup> As noted above, the 1996 Act defines "interLATA services" as "telecommunications between a point located in a [LATA] and a point located outside such area."<sup>121</sup> The definition does not distinguish between domestic and international interLATA services. Further, international telecommunications services, which

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<sup>116</sup> See *infra* part III.F.2.

<sup>117</sup> MCI Reply at 8.

<sup>118</sup> See *infra* part III.F.2.

<sup>119</sup> Notice at ¶ 32.

<sup>120</sup> AT&T at 9-10; Comptel at 8; Excel at 12; ITAA at 5; USTA at 9; TRA at 8; MCI at 6; Sprint at 11; DOJ Reply at 8.

<sup>121</sup> 47 U.S.C. § 153(21).

originate in a LATA and terminate in a country other than the United States, or vice versa, fit within the statutory definition of interLATA services. Thus, we hereby adopt our tentative conclusion.

### **3. Provision of Services through a Single Affiliate**

#### **a. Background**

59. In the Notice, we tentatively concluded that BOCs may conduct all, or some combination of, manufacturing activities, interLATA telecommunications services, and interLATA information services through a single separate affiliate, so long as the affiliate satisfies all statutory and regulatory requirements imposed on the provision of each type of service.<sup>122</sup> Elsewhere in the Notice, we sought comment on whether the 1996 Act permits us to, and if so, whether we should, interpret or apply any of the requirements of section 272(b) differently with respect to a BOC's provision of interLATA telecommunications services, which are regulated under Title II, as opposed to a BOC's engagement in manufacturing and provision of interLATA information services, which are unregulated activities.<sup>123</sup> In addition, we sought comment on how we could impose different regulatory requirements if a BOC provides both regulated and unregulated services through a single affiliate.<sup>124</sup>

#### **b. Comments**

60. The majority of parties agree that BOCs may engage in manufacturing activities, and also provide interLATA telecommunications services and interLATA information services, through the same affiliate.<sup>125</sup> Further, most of the parties that commented on these issues state that neither the text of the statute nor regulatory concerns mandate that we apply the section 272(b) requirements differently to regulated services and unregulated activities offered through such an affiliate.<sup>126</sup> The Ohio Commission asserts, however, that BOCs should not be permitted to offer regulated interLATA telecommunications services together with unregulated competitive services, unless they are willing to have their unregulated services subject to the same scrutiny

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<sup>122</sup> Notice at ¶ 33.

<sup>123</sup> The Commission retains ancillary jurisdiction over unregulated services pursuant to Title I of the Communications Act of 1934. See 47 U.S.C. § 154(i).

<sup>124</sup> Id. at ¶ 56.

<sup>125</sup> Ameritech at 63; Bell Atlantic, Exhibit 1, at 1; NYNEX at 38 n.52; PacTel at 4; US West at 19; USTA at 10; Sprint at 12-13; TIA at 15.

<sup>126</sup> E.g., MCI at 22 (expressing no opinion as to manufacturing); PacTel at 18-19; TIA at 19-20; USTA at 18-19. Contra Ohio Commission at 8.

as their regulated services.<sup>127</sup> VoiceTel argues that BOCs should be required to separate the provision of manufacturing activities from other competitive services, to prevent the interLATA service operations provided by the BOC's affiliate from obtaining an unfair advantage through access to information about manufacturing developments.<sup>128</sup>

**c. Discussion**

61. Based on the comments submitted in the record and our analysis of the 1996 Act, we adopt our tentative conclusion that BOCs may conduct all, or some combination, of manufacturing activities, interLATA telecommunications services, and interLATA information services through a single separate affiliate. Section 272(a) requires a BOC to provide these services through "one or more affiliates" that are "separate from any operating company entity that is subject to the requirements of section 251(c)."<sup>129</sup> We conclude that this language is intended to allow the BOCs flexibility in structuring their provision of competitive services, so long as those services are separated from the BOCs' provision of any local exchange services that are subject to the requirements of section 251(c).

62. We further conclude, as a policy matter, that it is not necessary to require the BOCs to separate their manufacturing activities from their provision of interLATA telecommunications services and interLATA information services, as suggested by VoiceTel.<sup>130</sup> First, a BOC's manufacturing activities do not entail control over bottleneck local exchange facilities. Second, during the period that the MFJ prohibited the BOCs from engaging in manufacturing activities, a competitive market for these activities developed.<sup>131</sup> The market for

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<sup>127</sup> Ohio Commission at 8.

<sup>128</sup> VoiceTel at 10-11.

<sup>129</sup> 47 U.S.C. § 272(a)(1).

<sup>130</sup> See VoiceTel at 10-11. In contrast, the Telecommunications Industry Association, a national trade association representing manufacturers and suppliers of telecommunications equipment and customer premises equipment (CPE), agrees that the BOCs may provide manufacturing activities through the same section 272 affiliate that provides interLATA telecommunications services and interLATA information services. TIA at 15-16.

<sup>131</sup> Under the MFJ, the BOCs were not prohibited from providing CPE. In 1987, the Commission lifted the structural separation requirement it had imposed on BOC provision of CPE, based in part on a determination that the CPE industry was substantially competitive. See Furnishing of Customer Premises Equipment by the Bell Operating Companies and the Independent Telephone Companies, CC Docket No. 86-79, Report & Order, 2 FCC Rcd 143, 147, ¶ 25 (1987) (BOC CPE Relief Order); see also Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), CC Docket No. 81-893, Memorandum Opinion & Order, 8 FCC Rcd 3891, 3891, ¶ 5 (1993).

information services is fully competitive;<sup>132</sup> the market for interLATA telecommunications services is also substantially competitive.<sup>133</sup> Thus, while a BOC may achieve certain efficiencies and economies of scope by conducting all three categories of activity through the same section 272 affiliate, it cannot thereby increase its ability to exercise market power in either the manufacturing, interLATA telecommunications services, or interLATA information services markets. Further, we note that section 273, which is the subject of a separate proceeding,<sup>134</sup> establishes additional safeguards applicable to BOC manufacturing activities, which are intended to promote competition and prevent discrimination.<sup>135</sup> For these reasons, we conclude that BOCs may conduct all, or some combination of, manufacturing activities, interLATA telecommunications services, and interLATA information services through the same section 272 affiliate.

63. Further, we decline to adopt different requirements pursuant to section 272(b) for regulated and unregulated activities. The safeguards of section 272(b) apply to any "separate affiliate required by" section 272(a).<sup>136</sup> Thus, the section 272(b) safeguards address the BOCs' potential to allocate costs improperly and to discriminate in favor of their section 272 affiliates, irrespective of the activities in which those affiliates engage.

#### 4. Manufacturing Activities

64. In the Notice, we stated that BOCs may only engage in manufacturing activities through a separate affiliate that meets the requirements of section 272, and noted that section 273

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<sup>132</sup> See, e.g., Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), CC Docket No. 20828, Final Order, 77 FCC 2d 384, 433, ¶ 128 (1980) (Computer II Final Order); Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), CC Docket No. 85-229, Report & Order, 104 FCC 2d 958, 1010, ¶ 95 (1986) (Computer III Phase I Order).

<sup>133</sup> See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket No. 96-61, Second Report & Order, FCC 96-424, at ¶¶ 21-22 (rel. October 31, 1996) (Tariff Forbearance Order); Motion of AT&T to be Reclassified as a Non-Dominant Carrier, Order, 11 FCC Rcd 3271, 3278-3279, 3288, ¶¶ 9, 26 (1995) (AT&T Nondominance Order); Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report & Order, 6 FCC Rcd 5880, 5887, ¶ 36 (1991) (First Interexchange Competition Order).

<sup>134</sup> See Implementation of Section 273 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, CC Docket No. 96-254, Notice of Proposed Rulemaking, FCC 96-472 (rel. Dec. 11, 1996) (Manufacturing NPRM).

<sup>135</sup> See, e.g., 47 U.S.C. § 273(c) (requiring the BOCs to file with the Commission and disclose to competitors and interconnecting carriers information regarding protocols and technical requirements for connection with and use of its telephone exchange service facilities); 47 U.S.C. § 273(e) (imposing nondiscrimination requirements, procurement standards, joint network planning and design requirements, and proprietary information protection requirements on BOCs and their manufacturing affiliates).

<sup>136</sup> 47 U.S.C. § 272(b).

sets forth additional safeguards applicable to BOC entry into manufacturing activities.<sup>137</sup> Subsequent to the closing of the record in this proceeding, the Commission released a Notice of Proposed Rulemaking to clarify and implement the provisions of section 273.<sup>138</sup> Several parties have raised arguments relating to the section 273 provisions on the record in this proceeding.<sup>139</sup> Because this proceeding implements the non-accounting safeguards provisions of sections 271 and 272, arguments relating to the specific provisions of section 273 are more appropriately addressed in the section 273 proceeding. We note that BOCs must conduct their manufacturing activities through a section 272 separate affiliate, manufacture and provide telecommunications equipment and CPE in accordance with section 273, and comply with the regulations that the Commission promulgates to implement both sections 272 and 273.

## **B. Mergers/Joint Ventures of Two or More BOCs**

### **1. Background**

65. In the Notice, we tentatively concluded that, pursuant to sections 271(i)(1)<sup>140</sup> and 153(4)(B),<sup>141</sup> if two or more of the BOCs combine their operations through merger or acquisition, the in-region states of the resultant entity shall include all of the in-region states of each of the BOCs involved in the merger/acquisition.<sup>142</sup> We sought comment on whether the entry into a merger agreement or a joint venture arrangement by two or more BOCs affects the application of the section 271 and 272 non-accounting separate affiliate and nondiscrimination requirements

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<sup>137</sup> Notice at ¶ 35.

<sup>138</sup> See Manufacturing NPRM.

<sup>139</sup> See, e.g., TIA at 10-15 (addressing the scope of the term "manufacturing"); US West Reply at 20-24 (arguing that section 273(b)(1) authorizes a BOC to participate with a manufacturer in the design of equipment on an unseparated basis and without awaiting section 271(d) authorization); see also ITI/ITAA Reply at 2-3, 9-10.

<sup>140</sup> Section 271(i)(1) provides that "[t]he term 'in-region State' means a State in which a Bell operating company or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on the day before the date of enactment of the Telecommunications Act of 1996." 47 U.S.C. § 271(i)(1).

<sup>141</sup> Section 3(4) provides that "[t]he term 'Bell operating company' . . . (B) includes any successor or assign of any such company that provides wireline telephone exchange service; but (C) does not include an affiliate of such company, other than an affiliate described in subparagraph (A) or (B)." 47 U.S.C. § 153(4).

<sup>142</sup> Notice at ¶ 40. Specifically, we noted that Bell Atlantic had announced plans to acquire NYNEX, and that SBC and PacTel had announced their intent to merge. *Id.* at n.74. These mergers have not yet been completed, although on November 5, 1996, the Department of Justice announced that it was closing its investigation into the SBC-PacTel merger, having concluded that the merger does not violate the antitrust laws. See U. S. Department of Justice, Antitrust Division, Antitrust Division Statement Regarding Pacific Telesis/SBC Communications Merger, News Release, DOJ 96-542 (November 5, 1996). In this Order, as in the Notice, we intend that our analysis of mergers between or among BOCs be extended to the acquisition of one BOC by another.

to those BOCs. We further sought comment on whether additional safeguards are required to ensure that these BOCs do not provide the affiliates of their merger partners with an unfair competitive advantage during the pendency of their merger agreement.

## 2. Comments

66. All parties that commented on this issue unanimously agree with our tentative conclusion that, upon completion of a merger between or among BOCs, the in-region states of a merged entity shall include all of the in-region states of the BOCs involved in the merger.<sup>143</sup>

67. Existing and potential competitors of the BOCs express concern about the incentive and ability of the BOCs to discriminate in favor of the affiliates of their merger or joint venture partners during the pendency of a merger or joint venture. For the purpose of applying the section 272 safeguards, they urge the Commission to treat the regions of BOCs entering a merger or joint venture as combined from the time that they enter into the merger or joint venture agreement.<sup>144</sup> Further, competitors argue that all nondiscrimination safeguards that apply to the BOC's dealings with its own section 272 affiliates should apply to the BOC's dealings with the section 272 affiliates of its merger or acquisition partner, as well as to dealings with a joint venture partner.<sup>145</sup>

68. In contrast, the DOJ and several BOCs contend that because BOCs would not become affiliates of one another until a merger is consummated, entry into a merger agreement would have no effect on the application of the section 272 safeguards, which pertain to a BOC's relationship with (and potential discrimination in favor of) its own affiliate.<sup>146</sup> USTA further contends that a rule attributing the in-region service area of merging BOCs to one another during the pendency of a merger would be very difficult to administer.<sup>147</sup> These parties argue that the Commission need not adopt any additional regulations to govern the conduct of proposed merger partners during the pendency of a proposed merger. They claim that sufficient protection against unfair discrimination by BOCs in conjunction with mergers, acquisitions, and joint ventures already exists.<sup>148</sup>

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<sup>143</sup> Ameritech at 66; AT&T at 15; Comptel at 11-12; Excel at 3; USTA at 13; MCI at 14; Sprint at 15; ITAA at 9 n.22; New York Commission at 6; TRA at 10; DOJ Reply at 8.

<sup>144</sup> AT&T at 15; Comptel at 12-13; Excel at 2-4; TRA at 10-11; Sprint at 15; Sprint Reply at 8-9; accord New York Commission at 6-7.

<sup>145</sup> TRA at 10-11; Sprint at 15; accord MCI Reply at 7.

<sup>146</sup> DOJ Reply at 9; USTA at 13-14; NYNEX Reply at 28-29; PacTel at 8.

<sup>147</sup> USTA at 13-14; see also PacTel Reply at 5.

<sup>148</sup> DOJ Reply at 9; USTA at 13; Ameritech at 66; Nynex Reply at 28-29; PacTel at 8.

### 3. Discussion

69. We note the unanimous support among parties that commented on the issue, and hereby affirm our tentative conclusion that, upon completion of a merger between or among BOCs, the in-region states of the merged entity shall include all of the in-region states of each of the BOCs involved in the merger.<sup>149</sup> We decline, however, to adopt a general rule that would treat the regions of merging BOCs as combined prior to completion of the merger, for the purposes of applying the section 272 separate affiliate and nondiscrimination safeguards. Section 272 requires a BOC to provide certain services (interLATA telecommunications and information services and manufacturing activities) through one or more separate affiliates, and establishes nondiscrimination requirements that apply to the BOC's conduct and its relationship with these affiliates. Section 3(1), in turn, defines an "affiliate" as "a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership and control with, another person."<sup>150</sup> Prior to completion of a merger, the merging BOCs are neither affiliates, nor successors or assigns, of one another. Thus, entry into a merger agreement does not render the section 272 safeguards applicable to a BOC's relationship with its merger partner, nor to its relationship with its merger partner's affiliates. Moreover, treating the regions of merging BOCs as combined from the inception of a merger agreement might create considerable problems in applying the section 271 and 272 safeguards. For example, if BOC A were offering out-of-region interLATA services in BOC B's region at the time the two entered a merger agreement, BOC A might be required immediately to cease the provision of such services until it had received approval under section 271 to offer in-region interLATA services. That result would be both disruptive and confusing to customers.

70. We further decline to adopt any additional regulations applicable to pending mergers or joint ventures between or among BOCs. We are persuaded that adequate protections against discriminatory and anticompetitive conduct already apply to mergers, acquisitions, and joint ventures among BOCs. As the DOJ and other commenters point out, these protections include the nondiscrimination obligations of sections 201 and 202 of the Communications Act, which, among other things, prevent the BOCs from unjustly or unreasonably discriminating in providing facilities or services to interexchange carriers, and would thus govern a BOC's relationship with the long-distance affiliate of its merger partner. Continuing enforcement of the MFJ equal access requirements and pre-existing Commission-prescribed interconnection requirements, pursuant to section 251(g), also safeguards against BOC discrimination in favor of the affiliates of their merger partners. Further, as USTA notes, BOCs will be subject to the pre-

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<sup>149</sup> Similarly, where such a transaction takes the form of an acquisition, rather than a merger, pursuant to 47 U.S.C. § 153(4)(B), the surviving BOC shall become the successor or assign of the acquired BOC, and thus the in-region area of the surviving BOC shall include the in-region states of the acquired BOC.

<sup>150</sup> Section 3(1) further provides, "[f]or the purposes of this paragraph, the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent." 47 U.S.C. 153(1).

merger review process under the Hart-Scott-Rodino amendment to the Clayton Act.<sup>151</sup> Moreover, as MCI suggests, we retain our authority to impose additional safeguards in the context of particular mergers, should circumstances demonstrate the need for such safeguards, on a case-by-case basis.<sup>152</sup>

### C. Previously Authorized Activities

#### 1. Background

71. In the Notice, we sought comment on the meaning of and interaction between sections 271(f), 272(a)(2)(B)(iii), and 272(h).<sup>153</sup> Specifically, we sought comment on whether, subject to the exception established by section 272(a)(2)(B)(iii), section 272(h) requires the BOCs to come into compliance with the section 272 safeguards with respect to all of the activities listed in section 272(a)(2)(A)-(C) that they were providing on the date of enactment of the 1996 Act.<sup>154</sup> We observed that section 272(a)(2)(B)(iii) establishes an exemption for "previously authorized activities described in section 271(f)" from the separate affiliate requirement for "origination of interLATA telecommunications services."<sup>155</sup> We sought comment on whether Congress intended, through section 272(h), to require BOCs engaged in previously authorized manufacturing activities and interLATA information services to come into compliance with the section 272 requirements.<sup>156</sup>

#### 2. Comments

72. Section 271(f). In general, the BOCs interpret section 271(f) to mean that section 271(a), which prohibits BOCs from providing in-region interLATA services prior to obtaining section 271 authorization, does not affect their provision of interLATA services that have already been authorized by the MFJ court, as long as they continue to provide such services in accordance

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<sup>151</sup> USTA at 13-14; see Hart-Scott-Rodino Antitrust Improvement Act of 1976, P.L. 94-435, Title II, § 201, 90 Stat. 1390, codified at 15 U.S.C. § 18a. The Hart-Scott-Rodino review process provides an opportunity for the DOJ or the FTC to block a proposed merger that would be anticompetitive and would violate federal antitrust laws. By subjecting merging BOCs to the scrutiny of these agencies during the period prior to consummation of their merger, Hart-Scott-Rodino review may curb their incentive to engage in discriminatory conduct during this period.

<sup>152</sup> See MCI at 14-15 (citing Interim BOC Out-of-Region Order at ¶ 33).

<sup>153</sup> Notice at ¶¶ 34, 38-39.

<sup>154</sup> Id. at ¶ 34, 38.

<sup>155</sup> Id. at ¶ 38.

<sup>156</sup> Id. at ¶ 39.

with the terms and conditions imposed by the MFJ court.<sup>157</sup> Several potential competitors argue that section 271(f) does not address whether BOCs must provide previously authorized services through a section 272 separate affiliate, but rather authorizes the BOCs to continue to provide in-region interLATA services for which they had obtained MFJ waivers prior to enactment of the 1996 Act, without first obtaining section 271 authorization.<sup>158</sup> Interexchange carriers argue that, to the extent certain previously authorized activities are not required eventually to comply with section 272 separate affiliate requirements, they must continue to be provided subject to the terms and conditions contained in an order of the MFJ court.<sup>159</sup>

73. Section 272(a)(2)(B)(iii). Bell Atlantic and BellSouth argue that section 272(a)(2)(B)(iii) exempts all previously authorized activities described in section 271(f) from the section 272 separate affiliate requirements.<sup>160</sup> Ameritech and PacTel argue that section 272(a)(2)(B)(iii) exempts from the section 272 separate affiliate requirements all previously authorized interLATA telecommunications services and interLATA information services.<sup>161</sup> In general, potential competitors to the BOCs argue that section 272(a)(2)(B)(iii) only exempts previously authorized interLATA telecommunications services from the section 272 separate affiliate requirements.<sup>162</sup> One BOC agrees with this interpretation.<sup>163</sup> These parties argue that section 272(a)(2)(B)(iii) does not exempt previously authorized interLATA information services from the separate affiliate requirements, because section 272(a)(2)(B)(iii) only applies to interLATA telecommunications services.<sup>164</sup> Although the BOCs and their competitors disagree as to the scope of the section 272(a)(2)(B)(iii) exemption, they agree that the exemption is permanent.<sup>165</sup>

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<sup>157</sup> BellSouth at 18-19, 24; NYNEX at 39; U S West at 15; cf. Ameritech at 63-64.

<sup>158</sup> See, e.g., MCI Reply at 5-6; see also TRA at 9; ITAA at 8; Comptel at 10-11.

<sup>159</sup> AT&T at 12 n.12; Comptel at 10-11; MCI at 9 n.21; Sprint at 13 n.10; MCI Reply at 4-5.

<sup>160</sup> Bell Atlantic, Exhibit 1, at 2; BellSouth at 19.

<sup>161</sup> Ameritech at 64-65 (arguing that interLATA information services are covered by the section 272(a)(2)(B)(iii) exemption because they are a subset of interLATA telecommunications services); PacTel at 5-6; Ameritech Reply at 32-33; PacTel Reply at 3 (arguing that the scope of section 272(a)(2)(B) is not limited to "telecommunications services" because the excepted categories of "incidental interLATA services" and "previously authorized services" both include information services); see also USTA at 12-13; NYNEX Reply at 28 n.87.

<sup>162</sup> MCI at 8-9; Sprint at 13-14; ITAA at 8; Sprint Reply at 6.

<sup>163</sup> U S West at 16-17.

<sup>164</sup> MCI at 8-9; ITAA at 8; U S West at 16; MCI Reply at 6; Sprint Reply at 6.

<sup>165</sup> Ameritech at 65; BellSouth at 19; NYNEX at 42; MCI at 8-9; Sprint at 13.

74. Section 272(h). Although the BOCs generally agree that section 272(h) authorizes a transition period for compliance with the separate affiliate requirements,<sup>166</sup> their views diverge as to the effect of the section. At one extreme, PacTel argues that section 272(h) does not apply to previously authorized interLATA information or telecommunications services or manufacturing activities, but rather provides a one-year transition period for compliance with requirements imposed on the telephone exchange and exchange access activities BOCs were providing on the date of enactment of the 1996 Act, e.g., compliance with section 272(e).<sup>167</sup> Several BOCs argue that section 272(h) requires only previously authorized manufacturing activities to come into compliance with the separate affiliate requirements, because section 272(a)(2)(B)(iii) exempts all previously authorized services involving interLATA telecommunications, including information services.<sup>168</sup> At the other extreme, U S West argues that section 272(h) applies to all previously authorized manufacturing and interLATA information services, giving BOCs one year from the date of enactment of the 1996 Act to move these services into section 272 separate affiliates.<sup>169</sup> MCI, Sprint, and ITAA endorse U S West's position.<sup>170</sup>

75. Differential Treatment. A majority of the BOCs propose interpretations of sections 271(f), 272(a)(2)(B)(iii), and 272(h) that would result in differential treatment for different types of previously authorized services. NYNEX and U S West argue that permanently exempting only previously authorized interLATA telecommunications services from the section 272 separate affiliate requirements makes sense, because most of the telecommunications services for which BOCs obtained MFJ waivers would be impossible, or too costly, to provide on a separated basis.<sup>171</sup> Ameritech, however, contends that the Commission should not differentiate between previously authorized interLATA telecommunications services and previously authorized

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<sup>166</sup> See NYNEX at 41-42; Bell Atlantic, Exhibit 1, at 2; PacTel at 6; SBC at 11; see also MFS Reply at 16.

<sup>167</sup> PacTel at 5-6.

<sup>168</sup> USTA at 12-13; Ameritech Reply at 33; cf. NYNEX at 39; Ameritech at 65-66 (section 272(h) allows one year for the BOCs to come into compliance with the section 272 requirements for all interLATA information services and interLATA telecommunications services they are providing pursuant to MFJ waivers that incorporate a separate affiliate requirement.)

<sup>169</sup> U S West at 17-18.

<sup>170</sup> MCI at 8-9; Sprint at 13-14; see also ITAA at 8 (specifically referring to interLATA information services).

<sup>171</sup> NYNEX at 39-40; U S West at 17. NYNEX and U S West state that most waivers granted by the MFJ court for provision of interLATA telecommunications services contemplated integrated provision of these services, including numerous waivers to provide Extended Area Service (EAS) by expanding the local calling area of a small number of usually rural customers to include nearby "communities of interest" located in another LATA.

information services, arguing that certain previously authorized interLATA information services cannot efficiently be provided on a separated basis.<sup>172</sup>

### 3. Discussion

76. Based on the record before us and our analysis of the relevant statutory terms, we conclude that BOCs may continue to provide all previously authorized services without interruption, pursuant to the terms and conditions set forth in the MFJ court orders that authorize those services. Previously authorized interLATA information services and manufacturing activities must come into compliance with the section 272 separate affiliate requirements within one year. Previously authorized interLATA telecommunications services, which do not have to comply with the section 272 separate affiliate requirements, must continue to be provided pursuant to the terms and conditions of the MFJ court orders that authorize them.

77. Section 271(f). As a general matter, section 271 addresses the timing and requirements for BOC entry into the interLATA market. Section 271(f) specifies that neither section 271(a) nor section 273 "prohibits" a BOC or its affiliate from engaging, at any time after enactment, in any activity previously authorized by an order of the MFJ court, subject to the terms and conditions imposed by the court.<sup>173</sup> We conclude that the purpose of Section 271(f) is to preserve the BOCs' ability to engage in previously authorized activities, without first having to obtain section 271 authorization from the Commission. Section 271(f) by its terms does not address, and thus does not preclude, application of the section 272 separate affiliate requirements to previously authorized services. Except for specifying that BOCs may continue to provide previously authorized services pursuant to the terms and conditions contained within the MFJ court order authorizing the service, section 271(f) does not address the manner in which BOCs must structure their provision of previously authorized services, or whether they must provide these services through a separate affiliate. These issues are addressed in section 272.

78. Section 272(a)(2)(B)(iii). Section 272 sets forth separate affiliate and nondiscrimination requirements with which the BOC must comply in order to provide certain services. Separate subsections of section 272(a)(2) establish separate affiliate requirements for BOC provision of manufacturing activities (section 272(a)(2)(A)), origination of interLATA telecommunications services (section 272(a)(2)(B)), and interLATA information services (section

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<sup>172</sup> Ameritech at 63-64 (citing United States v. Western Electric, No. 82-0192 (D.D.C. Feb. 6, 1989) (granting a waiver for a reverse directory service provided through the telephone operating company) and United States v. Western Electric, No. 82-0192 (D.D.C. Sept. 11, 1989) (granting a waiver for "telecommunications devices for the deaf" (TDDS) and specifically finding that service to be an information service)).

<sup>173</sup> Section 273(a), like section 271, incorporates a timing element, permitting a BOC to manufacture and provide equipment "if" the FCC authorizes that BOC (or its affiliate) to provide interLATA services under 271(d). 47 U.S.C. § 273(a). The Joint Explanatory Statement indicates that this section permits a BOC to engage in manufacturing after the Commission authorizes the company to provide interLATA services under section 271(d) in any in-region state. Joint Explanatory Statement at 154.

272(a)(2)(C)). Section 272(a)(2)(B)(iii) exempts "previously authorized activities described in section 271(f)" from the separate affiliate requirement for "origination of interLATA telecommunications services." We conclude that, because this exemption appears in section 272(a)(2)(B), it applies by its terms only to previously authorized activities that involve the origination of interLATA telecommunications services.

79. Previously authorized activities described in section 271(f) may include both manufacturing activities and interLATA information services. Neither of these types of previously authorized activities, however, is exempt from the section 272 separate affiliate requirements, because neither section 272(a)(2)(A) nor section 272(a)(2)(C) contains an exemption for previously authorized activities similar to the explicit exemption set forth in section 272(a)(2)(B)(iii). We reject Ameritech's argument that section 272(a)(2)(B)(iii) exempts previously authorized interLATA information services from the section 272 separate affiliate requirements, because section 272(a)(2)(B) applies only to origination of interLATA telecommunications services.<sup>174</sup> Section 272(a)(2)(C) establishes the separate affiliate requirement for BOC provision of interLATA information services; there are exceptions to this requirement for electronic publishing services and alarm monitoring services, but there is no exception specified for previously authorized activities.

80. Section 272(h). As the majority of commenters agree, section 272(h) establishes a one-year transition period for BOCs to comply with the separate affiliate requirements of section 272 for all services they were providing on the date of enactment of the 1996 Act that are not exempt from these requirements. Because we concluded in the preceding paragraphs that previously authorized interLATA information services and manufacturing activities are not exempt from the section 272 separate affiliate requirements, BOCs providing these services must comply with those requirements within one year of enactment. We reject PacTel's argument that section 272(h) gives the BOCs one year to comply with the various requirements imposed by section 272 on their provision of exchange and exchange access services, because we find these requirements are effective immediately upon a BOC's entry into the in-region interLATA market pursuant to section 271.

81. Differential Treatment. We conclude that, with respect to requiring compliance with the section 272 separate affiliate requirements, Congress intended to treat previously authorized interLATA telecommunications services differently from previously authorized interLATA information services and manufacturing activities. Certain of the BOCs argue that such a distinction is justified because it would be more difficult to provide previously authorized interLATA telecommunications services on a separated basis.<sup>175</sup> Ameritech, however, argues that certain previously authorized interLATA information services, such as TDDS, would be equally

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<sup>174</sup> See Ameritech at 64-65.

<sup>175</sup> See, e.g., NYNEX at 39-40; U S West at 17.

difficult to provide on a separated basis.<sup>176</sup> Section 10 of the Communications Act requires us to forbear from applying any provision of the Act that is not necessary to ensure just and reasonable charges and practices in the telecommunications marketplace, or to protect consumers, if we find that such forbearance would promote competition and is consistent with the public interest.<sup>177</sup> Thus, to the extent a BOC demonstrates, with respect to a particular previously authorized interLATA information service, that forbearance from the section 272 separate affiliate requirement fully satisfies the section 10 test, we must forbear from requiring the BOC to provide that service through a section 272 affiliate.

#### **D. Out-of-region interLATA information services**

##### **1. Background**

82. In the Notice, we tentatively concluded that the BOCs must provide interLATA information services through a separate affiliate, regardless of whether these services are provided in-region or out-of-region. We observed that section 272(a)(2)(B)(ii) exempts out-of-region interLATA services from the separate affiliate requirement for "origination of interLATA telecommunications services," but there is no analogous exemption from the section 272(a)(2)(C) separate affiliate required for interLATA information services (other than electronic publishing and alarm monitoring services).<sup>178</sup>

##### **2. Comments**

83. BellSouth is the only BOC that addresses this issue, arguing that the statute does not require BOCs to provide out-of-region interLATA information services through a separate affiliate.<sup>179</sup> BellSouth asserts that the Commission's conclusion is based on the faulty premise that interLATA information services do not fall within the definition of "interLATA services" and therefore are not subject to the "in-region"/"out-of-region" dichotomy of section 271.<sup>180</sup> BellSouth further suggests that imposition of a separate affiliate requirement constitutes a prior restraint upon BOC provision of out-of-region information services and may violate the First Amendment.<sup>181</sup>

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<sup>176</sup> Ameritech at 63-64.

<sup>177</sup> 47 U.S.C. § 160.

<sup>178</sup> Notice at ¶ 41.

<sup>179</sup> BellSouth at 20-25.

<sup>180</sup> BellSouth at 20, 21-23.

<sup>181</sup> Id. at 20-21.

84. All of the other parties that responded to this inquiry support the Commission's tentative conclusion that BOCs must provide out-of-region interLATA information services through a section 272 separate affiliate.<sup>182</sup> Several parties reject BellSouth's argument that the Commission is prevented by the First Amendment from requiring BOCs to provide out-of-region interLATA information services through a separate affiliate.<sup>183</sup>

### 3. Discussion

85. Based on the record before us and our own statutory analysis, we hereby adopt our tentative conclusion that BOCs must provide out-of-region interLATA information services through a section 272 separate affiliate. Although we concluded above that "interLATA information services" are included within the term "interLATA services" as used in section 271(b), that determination does not alter the conclusion that BOCs must provide out-of-region interLATA information services through a section 272 separate affiliate.<sup>184</sup> Section 271(b)(2) permits a BOC or its affiliate to provide interLATA services, including interLATA information services, that originate outside its in-region states, immediately upon enactment of the 1996 Act. Section 271, however, does not address whether such services must be provided through a separate affiliate; that issue is addressed in section 272(a).

86. Section 272(a)(2)(B) requires a separate affiliate for the "origination of interLATA telecommunications services," but exempts from that requirement "out-of-region services described in section 271(b)(2)."<sup>185</sup> We conclude that the exception created by section 272(a)(2)(B)(ii) extends only to out-of-region interLATA services that are telecommunications services. Section 272(a)(2)(C) requires a separate affiliate for "interLATA information services," and exempts electronic publishing and alarm monitoring services from that requirement. There are no other exceptions to the requirements of section 272(a)(2)(C). As several commenters noted, section 272(a)(2)(B) explicitly excludes out-of-region services, but section 272(a)(2)(C) does not.<sup>186</sup> We agree with MCI that the explicit exclusion of out-of-region interLATA telecommunications services in one subsection of the statute, and the absence of such an express exclusion of out-of-region interLATA information services in another subsection of the same provision, suggests that Congress intended not to exclude the latter from the separate affiliate

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<sup>182</sup> AT&T at 12-13; LDDS at 12 n.10; MCI at 15; Sprint at 16; ITAA at 8-9; VoiceTel at 12; MCI Reply at 7-8; Sprint Reply at 11; CIX Reply at 4.

<sup>183</sup> Sprint Reply at 11; CIX Reply at 5 n.4.

<sup>184</sup> See *supra* part III.A.1.

<sup>185</sup> 47 U.S.C. § 272(a)(2)(B).

<sup>186</sup> MCI at 15; see also Sprint at 16; ITAA at 9; CIX Reply at 4.

requirement.<sup>187</sup> Therefore, we find that out-of-region interLATA information services are not excluded from the separate affiliate requirement for interLATA information services.

87. BellSouth has argued that requiring BOCs to provide out-of-region interLATA information services through a section 272 separate affiliate violates the First Amendment.<sup>188</sup> As noted above, we find that this result is required by the statute. Although the courts have ultimate authority to determine the constitutionality of this and other statutes, we find it appropriate to state that we find BellSouth's argument to be without merit.<sup>189</sup> BellSouth bases its argument on an assertion that as "content-related" services, information services are commercial speech entitled to First Amendment protections.<sup>190</sup> We conclude, first, that with respect to certain information services, a BOC neither provides, nor exercises editorial discretion over, the content of the information associated with those particular services, and therefore provision of those information services does not constitute speech subject to First Amendment protections.<sup>191</sup> Second, to the extent that BOC provision of other interLATA information services constitutes speech for First Amendment purposes, the section 272 separate affiliate requirement neither prohibits the BOCs from providing such services, nor places any restrictions on the content of the information the BOCs may provide.<sup>192</sup> Instead, the section 272 separate affiliate requirement is a content-neutral restriction on the manner in which BOCs may provide interLATA information services, intended by Congress to protect against improper cost allocation and discrimination concerns. Thus, we conclude that the separate affiliate requirement imposed by section 272 of the Communications Act on BOC provision of interLATA information services does not violate the First Amendment.<sup>193</sup>

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<sup>187</sup> MCI at 15 n.36 (citing League to Save Lake Tahoe, Inc. v. Trounaday, 598 F.2d 1164, 1171 (9th Cir. 1979)).

<sup>188</sup> BellSouth at 20-21.

<sup>189</sup> The Commission has previously offered its opinion on the constitutionality of other statutory provisions. See Inquiry Into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C. 2d 143, 155-156, ¶ 18 (1985).

<sup>190</sup> BellSouth at 20.

<sup>191</sup> Cf. Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445, 2456 (1994) (Turner). Protocol processing services are examples of information services that do not constitute commercial speech. See *infra* part III.F.1.

<sup>192</sup> Like the must-carry rules at issue in Turner, the section 272 separate affiliate requirement "on [its] face impose[s] burdens and confer[s] benefits without reference to the content of speech." Turner, 114 S. Ct. at 2460.

<sup>193</sup> Content-neutral time, place, and manner restrictions that serve a substantial government interest are constitutionally permissible. See, e.g., City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, *reh'g denied*, 475 U.S. 1132 (1986).

## E. Incidental InterLATA Services

### 1. Background

88. In the Notice, we sought comment on whether we should establish any non-accounting structural or nonstructural safeguards for BOC provision of the "incidental interLATA services" set forth in section 271(g), in light of section 271(h).<sup>194</sup> Section 271(h) directs the Commission to ensure that the provision of incidental interLATA services "will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market," and states that the provisions of section 271(g) "are intended to be narrowly construed."<sup>195</sup> We also sought comment regarding the interplay between section 271(h) and section 254(k), which prohibits telecommunications carriers from "us[ing] services that are not competitive to subsidize services that are subject to competition."<sup>196</sup>

### 2. Comments

89. The majority of parties that addressed the issue, BOCs and competitors alike, contend that section 272(a)(2)(B)(i) exempts all incidental interLATA services from the separate affiliate requirements of section 272, except section 271(g)(4) information storage and retrieval services.<sup>197</sup> In their comments, however, several parties note that the "incidental interLATA services" listed in section 271(g) include information services as well as telecommunications services.<sup>198</sup>

90. Although they generally acknowledge that incidental interLATA services are not subject to section 272 separate affiliate requirements, several competitors argue that the Commission has the authority to, and should, impose separate affiliate requirements on the

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<sup>194</sup> Notice at ¶ 37.

<sup>195</sup> 47 U.S.C. § 271(h).

<sup>196</sup> Notice at ¶ 37.

<sup>197</sup> USTA at 10-11; AT&T at 10; MCI at 9-10; Ameritech Reply at 37-38; BellSouth Reply at 25-26; see also BellSouth at 23-24; PacTel at 7; Time Warner at 14-15. But see ITAA at 8-9; CIX Reply at 4-5; cf. MCI Reply at 8.

<sup>198</sup> BellSouth at 23; see also PacTel Reply at 3. BellSouth asserts that audio, video, and other programming services, interactive programming services (47 U.S.C. § 271(g)(1)), alarm monitoring (47 U.S.C. § 271(g)(1)), two-way interactive video and Internet services to schools (47 U.S.C. § 271(g)(2)), and information storage and retrieval systems (47 U.S.C. § 271(g)(4)) are all information services. BellSouth at 21 n.50; see also BellSouth Oct. 29 Ex Parte at 1-2.

provision of these services.<sup>199</sup> In the alternative, competitors propose that incidental interLATA services should be subject to a variety of nonstructural safeguards. AT&T recommends that we apply the nondiscrimination provisions of sections 272(c) and (e) to BOC provision of incidental interLATA services, and that we enforce these requirements through network disclosure, accounting, cost allocation, and reporting requirements.<sup>200</sup> MCI argues that, for each service listed in section 271(g), BOCs must unbundle and make available on a nondiscriminatory basis to all carriers the same network elements, facilities, and services used in providing that service, pursuant to the Commission's comparably efficient interconnection (CEI) parameters.<sup>201</sup> NCTA contends that the Commission should prescribe safeguards related to inbound and outbound telemarketing of video programming services by the BOCs.<sup>202</sup>

91. In response, USTA and the BOCs argue that the Commission should not adopt any additional non-accounting structural or non-structural safeguards to govern BOC provision of the incidental interLATA services enumerated in section 271(g).<sup>203</sup> They argue that the Commission already has in place regulations applicable to incidental interLATA services that will protect telephone exchange ratepayers, such as the Part 61 price cap rules and the Part 32 accounting rules and Part 64 cost allocation rules, as well as regulations that ensure telecommunications competition, such as the section 251 interconnection and unbundling rules.<sup>204</sup> They further argue that additional safeguards are not warranted by any specific potential competitive harms, and would undercut the efficiencies of integration that Congress intended to permit the BOCs to obtain.<sup>205</sup>

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<sup>199</sup> Time Warner at 33-34 (specifically addressing video services); VoiceTel at 11 (section 254(k) provides authority); AT&T at 11 n.11 (sections 254(k) and 271(h) provide authority to impose separation requirements on a case-by-case basis); TRA at 9-10 (section 271(h) provides authority); NCTA at 3-4; MCI at 10-11 (incidental interLATA services should be subject to Competitive Carrier separation requirements).

<sup>200</sup> AT&T at 11-12. But see BellSouth Reply at 25-26 (sections 272(c), 272(e)(2), and 272(e)(4) apply by their terms to BOCs' dealings with affiliates).

<sup>201</sup> MCI at 11-12. But see BellSouth Reply at 26 (arguing that, under the statute, the Commission cannot require BOCs to unbundle and provide nondiscriminatory access to interLATA transmission services that are components of incidental interLATA services, because although BOCs may provide incidental interLATA services on an unseparated basis without prior section 271 authorization, they may not provide unbundled interLATA transmission services on a similar basis).

<sup>202</sup> NCTA at 4.

<sup>203</sup> Ameritech at 66; Bell Atlantic, Exhibit 1, at 1; PacTel at 6-7; U S West at 18; USTA at 11; Ameritech Reply at 37.

<sup>204</sup> Bell Atlantic, Exhibit 1, at 1-2; U S West at 18-19; see also PacTel at 7; PacTel Reply at 4-5.

<sup>205</sup> USTA at 11; see also PacTel at 7; Ameritech Reply at 38.

### 3. Discussion

92. Section 271(b)(3) permits the BOCs to provide incidental interLATA services described in section 271(g) immediately after the date of enactment of the 1996 Act. Thus, unlike other in-region interLATA services, BOCs may provide incidental interLATA services originating in their own in-region states without receiving prior authorization from the Commission pursuant to section 271(d). Neither section 271(b) nor section 271(g) addresses whether BOCs must provide incidental interLATA services through a section 272 separate affiliate; this issue is addressed by section 272 itself.

93. Scope of the section 272(a)(2)(B)(i) exemption. Section 272(a)(2)(B)(i) sets forth an exception to the separate affiliate requirement imposed on "origination of interLATA telecommunications services." Congress specifically limited this exception to the "incidental interLATA services described in paragraphs (1), (2), (3), (5), and (6) of section 271(g)."<sup>206</sup> Consistent with the analysis set forth in the two immediately preceding sections of this Order, we conclude that the section 272(a)(2)(B)(i) exception applies, by its terms, to the origination of incidental interLATA services that are telecommunications services.<sup>207</sup>

94. For the most part, the incidental interLATA services enumerated within the section 272(a)(2)(B)(i) exception are telecommunications services.<sup>208</sup> Although the incidental interLATA services set forth in sections 271(g)(1)(A), (B), and (C) include audio, video, and other programming services that do not appear to be solely telecommunications services, section 271(h) specifies that these incidental interLATA services "are limited to those interLATA transmissions incidental to the provision by a [BOC] or its affiliate of video, audio, and other programming services that the company or its affiliate is engaged in providing to the public."<sup>209</sup> We therefore conclude that, pursuant to section 272(a)(2)(B)(i), BOCs are not required to provide the interLATA telecommunications transmission incidental to provision of the programming services listed in sections 271(g)(1)(A), (B), and (C) through a section 272 separate affiliate.<sup>210</sup> Moreover,

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<sup>206</sup> 47 U.S.C. § 272(a)(2)(B)(i).

<sup>207</sup> See *supra* parts III.C and III.D.

<sup>208</sup> Congress deliberately excluded remote data storage and retrieval services that fall within section 271(g)(4) from the section 272(a)(2)(B)(i) exception. These services are interLATA information services. See *infra* paragraph 121.

<sup>209</sup> 47 U.S.C. § 271(h) (emphasis added).

<sup>210</sup> Although this determination reflects a refinement in our analysis of the meaning of sections 271(g)(1)(A), (B), and (C), and section 272(a)(2)(B)(i), since our issuance of the OVS Second Report and Order, it is consistent with our determination in that proceeding that BOCs are not required to provide open video services through a section 272 affiliate. See Implementation of Section 302 of the Telecommunications Act of 1996, CS Docket No. 96-46, Second Report & Order, FCC 96-249, ¶ 249 (rel. June 3, 1996) (OVS Second Report & Order); see also *Time Warner* at 33-34. In that proceeding, we concluded that section 653 was silent as to the need for a separate affiliate

alarm monitoring services, listed as incidental interLATA services under section 271(g)(1)(D), are explicitly excepted from the section 272 separate affiliate requirements under section 272(a)(2)(C).

95. In addition, section 271(g)(2), which designates as "incidental interLATA services" the interLATA provision of "two-way interactive video services or Internet services over dedicated facilities to or for elementary and secondary schools as defined in section 254(h)(5)," may encompass services that are not solely telecommunications services.<sup>211</sup> The statute does not classify educational interactive interLATA services as either telecommunications services or information services. We conclude, however, that the explicit inclusion of section 271(g)(2) in the list of services subject to the section 272(a)(2)(B)(i) exception exempts educational interactive interLATA services from the section 272 separate affiliate requirements. This interpretation is consistent with Congress's clear intent, expressed in other provisions of the 1996 Act, to promote the provision of advanced telecommunications and information services, of which educational interactive interLATA services are examples, to eligible public and non-profit elementary and secondary schools.<sup>212</sup> The inclusion of educational interactive interLATA services among the list of "incidental interLATA services" that BOCs could provide immediately upon enactment of the 1996 Act without prior Commission authorization promotes the congressional goal of rapidly deploying advanced telecommunications by permitting the BOCs to offer such services. Thus, we further find it reasonable to conclude that Congress did not wish to impose a significant regulatory barrier, in the form of a separate affiliate requirement, on BOC provision of these services.<sup>213</sup>

96. Additional regulation of incidental interLATA services. We decline to impose the section 272 separate affiliate requirements on incidental interLATA services that, as discussed

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requirement on provision of open video services, and that Congress had expressly directed that Title II requirements not be applied to the establishment and operation of an open video system under section 653. OVS Second Report & Order at ¶ 249. To the extent we interpreted the section 272(a)(2)(B)(i) exemption more broadly in that proceeding than we do in this proceeding, we determine that our current interpretation is correct.

<sup>211</sup> For simplicity, we refer below to the incidental interLATA services described by section 271(g)(2) as "educational interactive interLATA services."

<sup>212</sup> For example, section 254(h)(2) of the Communications Act requires the Commission to establish rules to enhance the availability of advanced telecommunications and information services to public institutional users. See 47 U.S.C. § 254(h)(2); Joint Explanatory Statement at 133. In addition, section 706(a) of the 1996 Act requires the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms)." See 1996 Act, § 706(a), 110 Stat. 56, 153 (codified as a note following 47 U.S.C. § 157).

<sup>213</sup> We note that even if any of the section 271(g)(2) educational interactive interLATA services were subject to the section 272 separate affiliate requirements under section 272(a)(2)(C), section 10 mandates that we forbear from enforcing any statutory or regulatory requirement that is not necessary to ensure just and reasonable charges and practices in the telecommunications marketplace, or to protect consumers, if we determine that such forbearance would promote competition and is consistent with the public interest. See 47 U.S.C. § 160.

above, are exempt from those requirements under section 272(a)(2)(B)(i).<sup>214</sup> Section 272 itself does not require the BOCs to provide these services through a separate affiliate. Further, we conclude as a legal matter that neither section 271(h) nor section 254(k) requires us to impose the section 272 separate affiliate requirements on exempt incidental interLATA services in order to protect telephone exchange ratepayers or competition in the telecommunications market. Moreover, we decline to do so as a matter of policy, because we see no present need to impose structural separation requirements beyond those mandated by Congress in order to protect against improper cost allocation and access discrimination. We likewise decline to impose any other structural separation requirements on BOC provision of these services, as suggested by certain commenters.<sup>215</sup> This decision comports with the Commission's prior determinations not to impose structural separation requirements in contexts in which it found that nonstructural safeguards provide sufficient protection against improper cost allocation and access discrimination (e.g., BOC provision of enhanced services).<sup>216</sup>

97. Under our rules, the BOCs are subject to existing nonstructural safeguards in their provision of incidental interLATA services, and we conclude that these safeguards are sufficient to protect telephone exchange ratepayers and competition in telecommunications markets, in accordance with section 271(h). For accounting purposes, incidental interLATA services will be treated as non-regulated services under our Part 32 affiliate transaction rules and Part 64 cost allocation rules, and accordingly costs associated with provision of those services may not be allocated to regulated services accounts.<sup>217</sup> Further, at the federal level and in many states, the BOCs are subject to price cap regulation, which reduces their incentive to engage in strategic

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<sup>214</sup> As noted above, remote data storage and retrieval services that fall within section 271(g)(4) are subject to the section 272 separate affiliate requirements.

<sup>215</sup> See, e.g., MCI at 10-11 (incidental interLATA services should be subject to Competitive Carrier requirements).

<sup>216</sup> See Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III), CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (Phase I Order), recon., 2 FCC Rcd 3035 (1987) (Phase I Reconsideration Order), further recon., 3 FCC Rcd 1135 (1988) (Phase I Further Reconsideration Order), second further recon., 4 FCC Rcd 5927 (1989) (Phase I Second Further Reconsideration Order); Phase I Order and Phase I Reconsideration Order vacated, California v. FCC, 905 F.2d 1217 (9th Cir. 1990) (California I); Phase II, 2 FCC Rcd 3072 (1987) (Computer III Phase II Order), recon., 3 FCC Rcd 1150 (1988) (Phase II Reconsideration Order), further recon., 4 FCC Rcd 5927 (1989) (Phase II Further Reconsideration Order); Phase II Order vacated, California I, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceeding, 5 FCC Rcd 7719 (1990) (ONA Remand Order), recon., 7 FCC Rcd 909 (1992), pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993) (California II); BOC Safeguards Order, 6 FCC Rcd 7571 (1991), vacated in part and remanded, California v. FCC, 39 F.3d 919 (9th Cir. 1994) (California III), cert. denied, 115 S. Ct. 1427 (1995).

<sup>217</sup> See 47 C.F.R. §§ 32.23; 32.27; 64.901 et seq. See also Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996, CC Docket No. 96-150, Report & Order, FCC 96-490, parts III.B.2.b, IV.B.4 (rel. Dec. 24, 1996) (Accounting Safeguards Order).

cost-shifting behavior.<sup>218</sup> The BOCs are also subject to the section 251 interconnection and unbundling requirements, which compel them to make available to other telecommunications carriers the local network elements and local exchange facilities that such carriers may require to provide services comparable to the incidental interLATA services listed in section 271(g).<sup>219</sup> Further, the BOCs are subject to network disclosure requirements imposed by section 251(c)(5), which require them to give timely information about network changes to their affiliates' competitors.<sup>220</sup>

98. Given the complement of nonstructural safeguards to which the BOCs are subject in their provision of incidental interLATA services, we find that the record in this proceeding does not justify the imposition of additional nonstructural safeguards on these services. We decline to extend to the integrated provision of incidental interLATA services any of the section 272(c) and 272(e) nondiscrimination requirements that depend on the existence of a section 272 affiliate, as suggested by AT&T.<sup>221</sup> Further, we decline to adopt any additional unbundling requirements applicable to BOC provision of incidental interLATA services, as suggested by MCI.<sup>222</sup> We agree with BellSouth that it would be inconsistent with the 1996 Act for us to require the BOCs to unbundle and make available interLATA transmission services that they are not authorized to provide except as components of an incidental interLATA service (*i.e.*, without obtaining prior authorization under section 271 or complying with the section 272 separation requirements).<sup>223</sup> For the foregoing reasons, we decline to adopt any additional structural or nonstructural safeguards applicable specifically to BOC provision of incidental interLATA services.

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<sup>218</sup> See, e.g., Bell Atlantic, Exhibit 1, at 1-2.

<sup>219</sup> See 47 U.S.C. §§ 251(c)(2) and (3). In addition, the Commission's Open Network Architecture (ONA) rules provide a mechanism for competitors that are not telecommunications carriers to obtain access to network elements and facilities used in the provision of information services. See Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, CC Docket No. 95-20, Notice of Proposed Rulemaking, 10 FCC Rcd 8360, 8374-75, ¶¶ 19-22 (1995) (Computer III Further Remand Proceedings). These ONA requirements apply to the BOCs regardless of whether they provide information services on an integrated or separated basis. See Computer III Remand Proceedings, CC Docket No. 90-368, Report & Order, 5 FCC Rcd 7719 (1990) (ONA Remand Order). As discussed *infra* at part III.F.4, the ONA requirements remain in place pending our completion of the Computer III Further Remand Proceedings.

<sup>220</sup> See Second Interconnection Order at ¶¶ 165-260. Pending conclusion of the Computer III Further Remand Proceedings, BOCs are also subject to the Computer III network disclosure requirements. See Computer III Phase II Order, 2 FCC Rcd at 3086, 3091-3093, ¶¶ 102, 134-140.

<sup>221</sup> See AT&T at 11-12; see also *infra* parts V and VI.

<sup>222</sup> See MCI at 11-12.

<sup>223</sup> See BellSouth Reply at 26.

**F. InterLATA Information Services****1. Relationship Between Enhanced Services and Information Services****a. Background**

99. In the Notice, we sought comment on the services that are included in the statutory definition of "information service,"<sup>224</sup> and whether that term encompasses all activities that the Commission classifies as "enhanced services."<sup>225</sup> We noted that the statutory definition of "information service" is based on the definition used in the MFJ, and that prior to passage of the 1996 Act, neither the Commission nor the MFJ court resolved the question of whether the definition of enhanced services under the Commission's rules was synonymous with the definition of information services under the MFJ.

**b. Comments**

100. Virtually all parties that commented on this issue agree that the statutory term "information services" encompasses all activities that fall within the Commission's definition of "enhanced services."<sup>226</sup> The majority of commenters, including BOCs, interexchange carriers, and certain organizations representing information service providers (ISPs), advocate that the

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<sup>224</sup> The Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20).

<sup>225</sup> Notice at ¶ 42. Under the Commission's rules, the term "enhanced services" refers to "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." See 47 C.F.R. § 64.702(a); see also North American Telecommunications Association Petition for Declaratory Ruling under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment, ENF No. 84-2, Memorandum Opinion & Order, 101 FCC 2d 349 (1985) (NATA Centrex Order), recon. 3 FCC Rcd 4385 (1988) (NATA Centrex Reconsideration Order).

<sup>226</sup> But see Ameritech at 69 (asserting that an enhanced service is not the same as an information service); Bell Atlantic, Exhibit 1, at 2-3 (asserting that "information services" do not include protocol processing services, which, with three limited exceptions, are considered "enhanced services").